PD-0589-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No. PD-0589-19

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/11/2020
DEANA WILLIAMSON, CLERK

PEDRO HERNANDEZ, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Haskell County
No. 11-17-00129-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Pedro Hernandez, Jr.

* The trial Judge was the Honorable Shane Hadaway, 39th Judicial District, Haskell County.

* Counsel for the State at trial and on appeal was District Attorney Michael Edward Fouts, P.O. Box 193, Haskell, Texas 79521.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant at trial was Byron Hatchett, P.O. Box 3374, Abilene, Texas 79604.

* Counsel for Appellant on appeal is Tim Copeland, P.O. Box 399, Cedar Park, Texas 78613.

INDEX OF AUTHORITIES

Cases

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant was convicted of burglary of a habitation involving theft of a cell phone. Review was granted to assess whether the evidence proved that Appellant committed theft of the phone lent to him to call 911 by residents of the home he just broke into when he fled with it after ending the call. The court of appeals properly deferred to the jury's resolution of the facts and affirmed. Reversing its decision would require this Court to resurrect the defunct alternative-reasonable-hypothesis

construct and to reject the "in the light most favorable" to the jury's guilty verdict sufficiency standard of review. Thus, an improvident grant dismissal is warranted. Alternatively, the lower court's decision should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

STATEMENT OF THE CASE

Appellant was convicted of burglary of a habitation. 1 CR 113. Enhanced by a prior conviction for aggravated sexual assault of a child and a conviction for assault family violence, he was sentenced to 50 years' imprisonment. 1 CR 141; 5 RR 6-7, 48. He appealed, claiming the evidence was insufficient to show that he committed theft when fleeing the burgled home with a cell phone. The court of appeals affirmed the trial court's judgment. *Hernandez v. State*, No. 11-17-00129-CR, 2019 WL 2147703, at *3-4 (Tex. App.—Eastland May 16, 2019) (not designated for publication).

STATEMENT OF PROCEDURAL HISTORY

The court of appeals rejected Appellant's sufficiency challenge and affirmed Appellant's conviction and sentence. *Id*. Appellant's petition for discretionary review was granted on November 20, 2019.

ISSUES PRESENTED

1. **"The Eleventh Court of Appeals decided an issue that is contrary to a decision of the Court of Criminal Appeals in that the Appeals Court decided the legal sufficiency in this case in a way that is contrary to the record and it failed to apply the legal authorities to the facts of Petitioner's case?"**

2. **"The Eleventh Court of Appeals decided an Issue that is contrary to a decision of the U.S. Supreme Court in that the Appeals Court did not apply the sufficiency legal standard set by the U.S. Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 to the facts in the Petitioner's case?"**

3. **"The trial court erred when it denied Petitioner's motion for directed verdict because the Petitioner was not guilty under the standard identified by the U.S. Supreme Court and the Texas Court of Criminal Appeals in *Jackson* and *Brooks* respectfully?"**

SUMMARY OF THE ARGUMENT

The lower court correctly applied clearly established sufficiency law, so the case should be dismissed as improvidently granted.

Alternatively, considering the evidence in the light most favorable to the jury's verdict, the evidence supports the finding that Appellant intended to deprive Brittany Amos of her cell phone when he unlawfully appropriated it. During his rapid-succession burglary of three homes, Appellant disregarded the property and privacy interests in the homes and personal effects of others. His flight with the phone was not absentminded; he deliberately exceeded the scope of consent given to use the phone. He knew he only had permission to call for aid while restrained inside the

house and had completed the call before fleeing. Additionally, Appellant wanted and needed the phone to update police on his location, safety, and injuries after taking flight. Lastly, once Appellant's drug-induced and self-perceived emergency ended and he was with police, he did not report taking the phone or its possible location so it could be returned to Brittany.

FACTS

I. Charged Offense.

Appellant was charged with burglary of a habitation for breaking into the Amos' home and attempting to commit theft or committing theft of Brittany's cell phone. *See* TEX. PENAL CODE § 30.02(a)(3); 1 CR 57-58.

II. Guilt-Phase: Three Burglaries and Theft of a Cell Phone.

Munday Police Chief Chris Mendoza was dispatched to find Appellant. 3 RR 26-27. Mendoza located him in front of a local business; Appellant seemed confused and reported that someone was "following" him to "beat him up." 3 RR 28-29. Appellant accepted Mendoza's offer to drive him ten miles to Knox City; Mendoza arranged for Knox City Deputy Jose Rojo to transport Appellant further on to Rochester. 3 RR 29-33. During the drive, according to Rojo, Appellant appeared a "bit incoherent" and said "that people were after him, they were going to kill him, and we're being followed." 3 RR 33, 36. Rojo dropped Appellant off at the Sandoval

residence in Rochester—where Appellant had lived with the Sandovals a year earlier before being told to leave. 3 RR 40, 92. Appellant asked Rojo to keep him safe and take him to jail; Rojo explained that he could not since Appellant had not committed a crime. 3 RR 34-35.

Appellant entered the Sandovals' back door, went to Bobbi's bedroom, startled and scared her and, brandishing a knife, knocked over a recliner, DVDs, and small items on a shelf; he then hid in the bathroom. 3 RR 92; Sandoval 911 Call. At some point, Bobbi got the knife from him, and she and her father told him to leave. 3 RR 92, 96-97. Appellant left by jumping through a glass window. 3 RR 92, 96-97.

Appellant then confronted preteen Tyreonna Amos when she was in her front yard with her dogs around 9:30-10:00 a.m. 3 RR 40, 56. He told her that people were shooting at him and he needed help. 3 RR 57. She did not hear any shots fired or see anyone; she told him to wait outside while she asked her father if he could come inside. 3 RR 40-41, 57. Appellant, however, "ran with her to the back of the house and . . . busted in the back door[.]" 3 RR 41, 58. Tyreonna woke up her father Brian Amos; Brian confronted Appellant as Appellant exited Brittany's (Brian's other daughter's) bedroom. 3 RR 40-41. Brian grabbed Appellant; Appellant was "freaking out," agitated, sweating, and bleeding on the floor. 3 RR 44, 47-48. Brittany called 911 on her cell phone. 3 RR 42. Brian restrained Appellant for 25-30

minutes while they waited for the police to respond. 3 RR 44-45. Appellant insisted someone was after him and pleaded to make a call so he could have someone come to get him and then leave. 3 RR 44-45, 48. Brian did not see anyone after Appellant when he looked out the front door and windows. 3 RR 45, 52. Brittany gave Appellant her phone to call for help. 3 RR 45. Brian released his grip on one of Appellant's hands so he could make the call. 3 RR 50, 60. Appellant called 911. 3 RR 45, 48-50, 60, 99. Brian believed Appellant was "high on something" and "going to try to do something" because he was "freaking out"; since the police had not yet responded, he just wanted to get Appellant out of his house. 3 RR 45, 51-52. Brian opened the storm door, and Appellant took off with the phone. 3 RR 45. Appellant fell off the porch, hit a pipe fence head first before jumping over it, and headed to the next door neighbor's house, which was owned by the McGhee couple. 3 RR 45, 50, 62, 65. In less than a minute, Brian heard glass shattering. 3 RR 62.

The McGhees were not at home when Appellant broke in through a large picture window. 3 RR 66, 87. Blood was smeared all over the walls, ceiling, floor, and carpet; Service Pro had to remove the flooring. 3 RR 66-67. Appellant broke a chair, knocked over a plant, and created a mess. 3 RR 70-71, 87. Appellant called 911 seeking assistance and stayed on the phone for over eleven minutes until Haskell County Sheriff's Deputy Kenney Barnett arrived. Track 4 911 Call.

When Deputy Barnett pulled up to the McGhee's house, Appellant came out the front door and walked straight to him. 3 RR 74-77, 80. He was "covered in blood," "sweating," "hysterical, paranoid, real wide-eyed," and saying people were trying to kill him. 3 RR 77-78. Barnett believed he was under the influence of a controlled substance. 3 RR 78-79. Barnett did not believe Appellant's fears were reasonable since he did not see anyone trying to harm Appellant. 3 RR 78. He gave Appellant some water, determined he had no life-threatening injuries, and sat with him until other officers arrived. 3 RR 79. Appellant was still paranoid, and Barnett assured Appellant he would protect him. 3 RR 81-82. First responders in an ambulance attended to Appellant and took him to the hospital. 3 RR 82, 96.

Deputy Christopher Keith found Brittany's cell phone outside the broken window at the McGhee house. 3 RR 90. He believed Appellant probably dropped it when crashing through the window. 3 RR 100-01.

The jury found Appellant guilty of burglary of a habitation.[1] 1 CR 111, 113.

[1] It rejected the lesser included offense of criminal trespass. 1 CR 111, 113. *But see State v. Meru*, 414 S.W.3d 159, 164-65 (Tex. Crim. App. 2013) (criminal trespass is not a lesser-included offense of burglary of a habitation when the burglary offense alleged does not state that entry included the entire body).

III. Court of Appeals' Decision Affirming Appellant's Burglary Conviction.

In the court of appeals, Appellant argued his appropriation was not unlawful and that he lacked the intent to deprive Brittany of her phone. *Hernandez*, 2019 WL 2147703, at *3-4. In support, he argued: (1) he thought he was being chased; (2) Brian stopped restraining him and let him leave; (3) he surrendered shortly after he ran from Brian's home (but before he was able to return the phone); and (4) he did not steal any other property. *Id*. at *3. The court of appeals disagreed. *Id*. at *3-4. Deferring to the jury's resolution of conflicting evidence, the court pointed to specific facts supporting the verdict. *Id*. at *3. First, it noted Appellant broke into Brian's house and had to be restrained. *Id*. Next, he knew he was given the phone for the limited purpose of making a call for help, and Appellant did not return it; instead, he fled with it and then accidently dropped it outside the McGhees' window. *Id*. Also, he possibly intended to retrieve it but was interrupted by police. *Id*.

ARGUMENT

I. Theft: Unlawful Appropriation and Intent to Deprive.

The sufficiency controversy here concerns the gravamen of theft. "[T]he gravamen of theft is in depriving the true owner of the use, benefit, enjoyment or value of his property, without his consent." *McClain v. State*, 687 S.W.2d 350, 353 (Tex. Crim. App. 1985). Appellant's grounds concern the unlawful appropriation and intent to deprive elements of theft. *See* Appellant's Brief at 14-18. A person commits theft "if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a). Attempt requires a showing that, "with the specific intent to commit an offense, he does an act amounting to more that mere preparation that tends but fails to effect the commission[.]" TEX. PENAL CODE § 15.01(a). "Appropriation of property is unlawful if: (1) it is without the owner's effective consent[.]" TEX. PENAL CODE § 31.03(b). Consent means "assent in fact, whether express or apparent[.]" TEX. PENAL CODE § 1.07(11). "[A]ppropriation must be accompanied by the specific intent to deprive the owner of the property." *Mills v. State*, 722 S.W.2d 411, 415 (Tex. Crim. App. 1986).

> "Deprive" means:
>
> (A) to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner;

. . .
(C) to dispose of property in a manner that makes recovery of the property by the owner unlikely.

TEX. PENAL CODE § 31.01(2)(A), (C) (last amended Sept. 2011). This element may be proven from the words and acts of the defendant. *Griffin v. State*, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981) (panel op.). And "[t]he fact that the deprivation later became temporary does not automatically mean that there was no intent to deprive permanently or for so long as to satisfy the statutory definition." *Id*.

II. Improvident Grant: the Alternative-Reasonable-Hypothesis Construct Should Never Be Resurrected and Deference to the Jury in Sufficiency Cases is Required.

A. Sufficiency Standard of Review.

When reviewing the sufficiency of the evidence, all of the evidence is considered in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, the factfinder was justified in finding guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The factfinder is the sole judge of credibility and weight given to evidence and is permitted to draw multiple reasonable inferences from facts when supported by the evidence *Id*. at 319. When there are conflicting inferences, it must be presumed that the factfinder resolved them in favor of the verdict. *Id*. at 326.

Long ago this Court recognized that the alternative-reasonable-hypothesis

construct is inconsistent with *Jackson*. *Wise v. State*, 364 S.W.3d 900, 902 (Tex. Crim. App. 2012) (since 1991, the alternative reasonable hypothesis standard is no longer applicable when reviewing legal sufficiency) (citing *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991), *overruled on different grounds in Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000)). The Court explained its rationale:

> [F]ocusing on the existence of an 'outstanding reasonable hypothesis inconsistent with the guilt of the accused', at least where the hypothesis of innocence stems from inconsistencies in the evidence presented at trial, effectively repudiates the jury's prerogative to weigh the evidence, to judge the credibility of the witnesses, and to choose between conflicting theories of the case. When understood from this perspective, the construct effectively places the reviewing court in the posture of a 'thirteenth juror'.

Geesa, 820 S.W.2d at 159. Guarding against partisan thirteenth-juror inquest and supremacy is important to maintaining the integrity of, and the public's faith in, the justice system. The factfinder, as this Court has repeatedly asserted, is best suited to observe firsthand the demeanor, facial expressions, mannerisms, inflection, and cadence of witnesses. *See Brooks v. State*, 323 S.W.3d 893, 899-900 (Tex. Crim. App. 2010) (plurality); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009).

B. The Guilty Verdict is Supported by Sufficient Evidence of Theft.

The jury's finding that Appellant unlawfully appropriated Brittany's cell phone with the intent to deprive is rational.

i. Setting Aside Hypothetical Alternatives.

At the outset, this Court should reject all alternative reasonable hypotheses offered to contradict or undermine the jury's findings. These include: (1) that Appellant only unlawfully entered three homes but did not steal anything, so he did not intend to steal the phone; (2) it would be "strange" for him to steal a phone when he did not use any burglary tools to enter any of the homes in broad daylight, had no plans of escape, and had no means to carry off any loot; (3) because his mini-rampages cause one to wonder what was going on in Appellant's mind, it cannot be said he intended anything at all; (4) Appellant did not return the phone because he was involved with the police; and (5) that appropriation was lawful because Brian indicated Appellant could leave; therefore, permission to leave extended to authorize the taking of the phone. *See* Appellant's Brief at 17-18. All of these must be discounted. It must be presumed that the jury found these alternative theories incredible, and this Court is required to defer to the jury's resolution of conflicting evidence.

ii. Deferring to Evidence Supporting Unlawful Appropriation and Intent to Deprive.

Giving proper deference, the evidence must be considered in a light most

favorable to the verdict. The jury rationally found that Appellant's appropriation was unlawful. Brian testified Appellant fled from his house with the phone without consent. 3 RR 46. Moreover, Brian and Brittany authorized use of the phone so Appellant could call for help. 3 RR 44-45, 48. Still inside the house, Brian released his grip on one of Appellant's hands so Appellant could make the call. 3 RR 44-45. Appellant completed the 911 call before fleeing with the phone. 3 RR 45, 50-52. It was rational for the jury to have found that Brian's act of releasing his restraint on Appellant and directing him to leave did not constitute authorization to take the phone with him. 3 RR 51-52. Appellant's use of the phone was limited to calling for aid while he remained restrained inside the house for the Amos' safety. *Cf. Johnson v. State*, 226 S.W.3d 439, 446 (Tex. Crim. App. 2007) (consent to search is limited in scope based on the circumstances of the emergency that prompted the wife to call 911after shooting her husband). It is irrational to believe that they intended a transfer of ownership of the phone containing "the privacies of life"[2] (and which was likely tethered to a contractual third-party plan) to Appellant when he had broken down the

[2] *Riley v. California*, 573 U.S. 373, 393, 403 (2014) ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.").

back door, scared Brian and his two minor daughters, and was bleeding, behaving erratically to the point of needing to be restrained, and stating that non-existent people were outside and trying to hurt him. 3 RR 40-53. The lower court correctly held that the jury rationally found that Appellant's flight from the home exceed the scope of authorized use and his appropriation was therefore unlawful.[3] *Hernandez*, 2019 WL 2147703, at *3.

Additionally, the jury rationally concluded Appellant intended to permanently deprive Brittany of her phone. First, Appellant violated the ownership rights and possessory interests of the Sandovals, Amos', and McGhees when sequentially breaking into their homes. 3 RR 41, 58, 66, 87, 92, 96-97. Appellant also damaged the Sandovals' and McGhees' personal property when inside their homes. 3 RR 66-67, 92, 96-97. Because Appellant showed no respect for the heightened property and privacy interests attached to the home and items therein, jurors logically concluded that Appellant consciously disregarded Brittany's privacy and ownership interests in the phone after she lent it to him to call for help.

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[3] Appellant states that the lower court conceded that Appellant was given permission to take the phone outside. Appellant's Brief at 15. The court of appeals did not make any such statement. *Hernandez*, 2019 WL 2147703, at *3 ("Although Brittany and/or Brian gave Appellant consent to use the cell phone for a phone call, they did not give Appellant consent to take the cell phone off the property.").

Appellant's efforts to seek the aid of law enforcement also support the jury's verdict that Appellant intended to deprive. Appellant had completed his 911 call before he left the Amos' house with it. 3 RR 45, 51-52. Therefore, he did not absentmindedly flee with it while reporting the ongoing emergency to the operator. A rational jury found that his flight with the phone was deliberate. Further, Appellant had repeatedly sought the assistance of police throughout his drug-induced crime-spree. 3 RR 26-36, 44-45, 48. Jurors therefore logically found that Appellant wanted to keep the phone so he could apprise authorities on his location, safety, and injuries. In fact, defense counsel argued it was his only lifeline.[4] This belief is supported by Appellant's use of the McGhee's land-line to call 911 once he was inside their home. After updating his location and while waiting for police, Appellant remained on the phone reporting that he was under attack and injured. And, as the court of appeals recognized, the jury determined that Appellant accidentally dropped it when entering

[4] Counsel did not explain Appellant's appropriation in terms of the legal justification of necessity. *See* TEX. PENAL CODE § 9.22; Appellant's Brief at 15. This makes sense because voluntary intoxication is not a defense to any intent element. *See* TEX. PENAL CODE § 8.04(a). Appellant could not have had a reasonable belief that his conduct was necessary to avoid imminent harm. Nor was there any evidence that, apart from intoxication, Appellant suffered from any diagnosed mental-health issues at the time of the offense. *See Ruffin v. State*, 270 S.W.3d 586, 588 (Tex. Crim. App. 2008) ("both lay and expert testimony of a mental disease or defect that directly rebuts the particular *mens rea* necessary for the charged offense is relevant and admissible unless excluded under a specific evidentiary rule.").

the McGhee's house through the window. *Hernandez*, 2019 WL 2147703, at *3.

Furthermore, Appellant asked Rojo to arrest him for his safety, but Rojo told him it was not an option because he had not committed a crime. 3 RR 34-35. Any inference that Appellant unlawfully entered the three homes and stole the cell to ensure he would be arrested and taken into police custody is supported by the evidence.

Finally, Appellant made no effort to return the phone despite having the opportunity to do so. Appellant was safely outside of the McGhee's house sitting with Barnett for about 20-30 minutes. 3 RR 78. At no time did Appellant tell Barnett he had taken the phone or where it could possibly be found. 3 RR 74-81.

In conclusion, a common-sense, rational understanding of the facts supports the jury's finding that Appellant committed theft.

PRAYER FOR RELIEF

Because the court of appeals correctly applied established law to a discrete set of facts, the Court should decline to exercise its discretionary review authority and dismiss the petition as improvidently granted. Alternatively, the court of appeals decision should be affirmed.

Respectfully submitted,

/s/ Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,212, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on February 7, 2020, via email or certified electronic service provider to:

Hon. Mike Fouts, District Attorney
da@co.haskell.tx.us
debbie.gressett@co.haskell.tx.us

Hon. Tim Copeland
tcopeland14@yahoo.com
ecopeland63@yahoo.com

/s/ Stacey M. Soule
State Prosecuting Attorney